In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1071

GROENDYKE TRANSPORT, INC., PETITIONER

v.

ELMER DAVIS, REGIONAL DIRECTOR, 16TH REGION, NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT DAVIS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8-18) is not yet officially reported. The opinion of the district court is set forth at Pet. App. 1-7.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1969. On January 14, 1969, Mr. Justice Black denied a stay of that judgment. The peti-

tion for a writ of certiorari was filed on February 20, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court had jurisdiction, in an independent equity suit, to enjoin enforcement of the Board's *Excelsior* rule (156 NLRB 1236), which requires an employer to furnish the names and addresses of its employees eligible to vote in a Board election, where other adequate means were available for obtaining judicial review of the validity of that rule.

2. Whether the court of appeals abused its authority in summarily reversing the district court's issuance of an injunction in the instant circumstances.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix to the petition (Pet. App. 24-25).

STATEMENT

On June 5, 1968, the Board directed respondent Regional Director to conduct elections among certain bargaining units of petitioner Company's employees. Pursuant to the rule announced in *Excelsior Underwear, Inc.* (156 NLRB 1236), the Board, in its decision, ordered the Company to submit to the Regional Director a list of the names and addresses of

the employees in each unit eligible to vote in the elections, which list would be made available to all election contestants (Pet. App. 4). The Company refused to produce the employee list, and the Regional Office thereafter served on it a subpoena *duces tecum* seeking the information previously ordered to be provided (Pet. App. 9.)

The Company did not move to revoke the subpoena, as it was entitled to do under Section 11(1) of the Act (29 U.S.C. 161(1)) and Section 102.66(c) of the Board's rules (29 C.F.R. 102.66(c)). Rather, it filed a complaint in the United States District Court for the Eastern District of Texas which sought to enjoin the Regional Director from conducting the elections and from initiating proceedings to enforce the subpoena *duces tecum* or otherwise to compel compliance with the *Excelsior* requirement. The Regional Director moved to dismiss the complaint on the grounds that the court lacked jurisdiction over the subject matter of the action and the complaint failed to state a claim upon which relief could be granted (Pet. App. 9-10.)

After a hearing, the district court, on August 1, 1968, denied the Regional Director's motion to dismiss and enjoined him from enforcing the subpoena against the Company. Relying on the decision of the First Circuit in *Wyman-Gordon Co.* v. *National Labor Relations Board*, 397 F. 2d 394, certiorari granted, 393 U.S. 932, the district court held that the *Excelsior* rule was unenforceable and void because it was adopted in violation of Section 6 of the National Labor Relations Act (29 U.S.C. 156) and

Sections 3 and 4 of the Administrative Procedure Act (5 U.S.C. (Supp. III) 552, 553). The district court therefore concluded that it had jurisdiction over the subject matter of the action under *Leedom* v. *Kyne*, 358 U.S. 184, since the Board, in imposing the *Excelsior* requirement, had in its view exceeded its statutory authority (Pet. App. 6-7).

Subsequently, on August 12, 1968, the Fifth Circuit, in *Howell Refining Co.* v. *National Labor Relations Board*, 400 F. 2d 213, held that the *Excelsior* rule was "a valid exercise of the Board's power to ensure employees a fair and free choice in the selection of their representative" (*id.* at 216), and expressly declined "to follow the *Wyman-Gordon* case" (*id.* at 216, n. 8). Thereupon the Board, which had appealed the district court's decision in the instant case to that court of appeals, moved the Fifth Circuit to reverse the district court summarily. Concluding that "expedited disposition by summary proceedings on briefs but without oral argument [was] called for and proper" (Pet. App. 8), the court of appeals granted the Board's motion and reversed the district court's decision (Pet. App. 8-18).

ARGUMENT

1. Petitioner contends that the district court had jurisdiction to issue injunctive relief here because the Board's *Excelsior* rule was not promulgated pursuant to the rule-making procedures of the Administrative Procedure Act, and because the rule violates

its employees' rights to refrain from union organization, to privacy, and to free association (Pet. 7-20). The Administrative Procedure Act question is directly presented in *National Labor Relations Board* v. *Wyman-Gordon Co.*, No. 463, this Term, and the other questions respecting the validity of the *Excelsior* requirement may also be reached in that case, in which argument was had on March 3, 1969.[1]

However, even if petitioner's contentions concerning the invalidity of the *Excelsior* requirement were correct, jurisdiction would not be conferred on the district court to enjoin enforcement of subpoenas *duces tecum* seeking to effectuate compliance with that requirement. Petitioner need not have produced an *Excelsior* list until ordered to do so by a district court in a subpoena enforcement proceeding, and in that proceeding petitioner would have had a full opportunity to raise any questions it wished respecting the validity of the requirement. See *Magnesium Casting Co.* v. *Hoban*, 401 F. 2d 516 (C.A. 1), certiorari denied, January 27, 1969, No. 819, this Term. The situation here is thus clearly distinguishable from that in *Leedom* v. *Kyne*, 358 U.S. 184, where this Court, in sustaining the exercise of district court jurisdiction in the special circumstances there, emphasized that the plaintiffs had "no other means

[1] In light of the posture of the instant case and the course of action petitioner attempted to follow here, there would appear to be no occasion for holding the case pending this Court's decision in *Wyman-Gordon*. Compare the Board's memoranda in *Beech-Nut Life Savers, Inc.* v. *National Labor Relations Board*, No. 946, this Term, and *Teledyne, Inc.* v. *National Labor Relations Board*, No. 982, this Term.

within their control * * * to protect and enforce [the] right" which Congress had given them (358 U.S. at 190). And, as the court below noted, this Court "has made abundantly clear that Leedom v. Kyne * * * is to be narrowly construed. Boire v. Greyhound Corp., 376 U.S. 473, 481 * * *" (Pet. App. 18).[2] Accordingly, the court of appeals correctly concluded that the district court lacked jurisdiction to issue an injunction here, and that its injunction constituted an impermissible interference with the Board's election processes (see Pet. App. 15).

2. Petitioner's additional contention (Pet. 22-25) that the court below abused its discretion by summarily disposing of the Board's appeal, without oral argument, is equally without substance. This Court has sanctioned the use of summary appellate proceedings in criminal cases, where no substantial issue of law is presented. *United States* v. *Johnson*, 327 U.S. 106, 113; *Carafas* v. *LaVallee*, 391 U.S. 234, 242; *Garrison* v. *Patterson*, 391 U.S. 464, 466. *A fortiori*, such proceedings are appropriate in civil cases, where, as here, the "outcome [of a case is] so certain" (Pet. App. 14). See, *e.g.*, *Mercado* v. *Commins*, 322 U.S. 465, 471, and generally Pet. App. 11-15.

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[2] Thus, petitioner's claim that district courts have "inherent jurisdiction" to enjoin agency action allegedly in excess of statutory authority (Pet. 21) is inapposite here.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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